CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 192/22

In the matter between:

COCA-COLA BEVERAGES AFRICA (PTY) LIMITED Applicant

and

COMPETITION COMMISSION First Respondent

FOOD AND ALLIED WORKERS UNION Second Respondent

Neutral citation:	*Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission and Another* [2024] ZACC 3
Coram:	Zondo CJ, Chaskalson AJ, Dodson AJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ and Tshiqi J
Judgments:	Dodson AJ (unanimous)
Heard on:	14 November 2023
Decided on:	17 April 2024
Summary:	Competition Act 89 of 1998 — Rules for the Conduct of Proceedings in the Competition Commission — standard of review in special statutory review under rule 39(2)(b) Competition Law — causation — merger approval conditions prohibiting retrenchments as a result of merger — correct test for determining causal link between merger and retrenchments

Competition Law — power of Competition Appeal Court to interfere with decision of the Competition Tribunal

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ORDER

On appeal from the Competition Appeal Court:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Competition Appeal Court is set aside and replaced with the following order:
   "(a) The appeal is dismissed.
   (b) Each party must bear its own costs."
4. Each party must bear its own costs in this Court.

JUDGMENT

DODSON AJ (Zondo CJ, Chaskalson AJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ and Tshiqi J concurring):

Introduction

[1] South Africa faces one of the highest unemployment rates in the world, particularly amongst the younger members of society.[1] This was no doubt taken into account by Parliament in formulating section 12A of the Competition Act (Act).[2] The

[1] See the unemployment data of the International Labour Organisation placing South Africa's unemployment rate second after eSwatini (11 January 2024), available at https://ilostat.ilo.org/topics/unemployment-and-labour-underutilization/.

[2] 89 of 1998.

section requires that, when deciding whether a merger is in the public interest, its effect on employment must be taken into account.[3] If it is decided to approve the merger, conditions may be imposed relevant to that impact. Here, conditions were imposed on approval of a merger that restricted post-merger retrenchments. This application for leave to appeal arises from a complaint that Coca-Cola Beverages Africa (Pty) Ltd (CCBA), the applicant, retrenched staff in breach of those conditions. CCBA seeks leave to appeal against a judgment of the Competition Appeal Court. The Competition Appeal Court overturned a decision of the Competition Tribunal (Tribunal), finding that CCBA had substantially complied with the conditions.

[2] The first respondent, the Competition Commission (Commission), opposes the application. The second respondent, the Food and Allied Workers Union (FAWU), lodged the original complaint with the Commission and participated in the proceedings in the Tribunal, representing the interests of its affected members. It did not, however, participate in the proceedings before the Competition Appeal Court or in this Court. The application is best understood against the backdrop of the statutory framework in the Act, to which I now turn.

Statutory framework

[3] Chapter 3 of the Act regulates mergers.[4] Section 12(1)(a) provides that "a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm". Three categories are recognised: small, intermediate and large mergers.[5] Categorisation is with reference to combined annual turnover or assets or a combination of these.[6] Here we are concerned with a large merger. If the Commission receives notice of a large merger, it must refer the notice and its recommendation to the Tribunal for consideration.[7]

[3] Section 12A(3)(b) read with section 12A(1A) of the Act.

[4] Under the heading "merger control". It is made up by sections 11-18.

[5] Section 11(5).

[6] Section 11(1) and (5).

[7] Section 14A(1)(a) and (b).

[4] The Tribunal's consideration of the merger is regulated by section 12A of the Act. Its first task is to determine whether the merger is likely to substantially prevent or lessen competition.[8] If this is likely, the Tribunal must consider (a) whether the merger is likely to result in a "technological, efficiency or other pro-competitive gain" that offsets the anti-competitive impact and (b) whether the merger can be justified on "substantial public interest grounds".[9] Despite its determination on these issues, the Tribunal must consider whether the merger is justifiable on public interest grounds.[10] Criteria for each of these evaluations are provided.[11] In considering justifiability on public interest grounds in terms of section 12A(3)(b) the Tribunal "must consider the effect that the merger will have on . . . employment" amongst other things. The Tribunal must then decide whether the merger is to be approved, approved conditionally or prohibited.[12] In the present matter the approval was subject to conditions, which are discussed later in the judgment.

[5] What if the merger conditions in respect of a large merger are breached? Upon application by the Commission, the Tribunal "may revoke its own decision to approve or conditionally approve a merger, or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues in section 12A(3)(b) or (c)".[13] This it may do where, amongst others, "a firm concerned

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[8] Section 12A(1).

[9] Section 12A(1)(a) and (b).

[10] Section 12A(1A).

[11] Section 12A(2) and (3).

[12] Section 16(2)(a) to (c).

[13] Section 16(3) of the Act, which provides:

> "Upon application by the Competition Commission, the Competition Tribunal may revoke its own decision to approve or conditionally approve a merger or, in respect of a conditional approval, make any appropriate decision regarding any condition relating to the merger, including the issues referred to in section 12A(3)(b) or (c), and section 15, read with the changes required by the context, applies to a revocation or other decision in terms of this subsection."

Section 12A(3)(b) relates to the effect of the merger on employment. Section 12A(3)(c) relates to the effect of the merger on small and medium businesses or firms owned by historically disadvantaged persons. Section 15 governs revocation of the approval of a small or intermediate merger by the Commission. The effect is to add, as grounds of revocation under section 16(3), a merger approval decision having been based on incorrect information for which a party to the merger is responsible, or the approval having been obtained by deceit or a breach of a merger condition.

has breached an obligation attached to the decision".[14] Alternatively, the Tribunal may impose an administrative penalty[15] "if the parties to a merger have . . . proceeded to implement the merger in a manner contrary to a condition for the approval".[16] The penalties may be substantial, up to 10% of annual turnover in the preceding financial year, including exports, for a first offender and 25% for a repeat offender.[17] Although it is not necessary to decide here, another sanction might be divestiture. Where "a merger is implemented in contravention of Chapter 3", the Tribunal may either "order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger" or "declare void any provision of an agreement to which the merger was subject".[18]

[6] A procedural framework has been established to deal with, amongst other things, such a breach. The starting point is section 27, which provides:

> "27 Functions of Competition Tribunal
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> (1) The Competition Tribunal may—
>
> . . .
>
> (b) adjudicate on any other matter that may, in terms of this Act, be considered by it, and make any order provided for in this Act;
>
> (c) hear appeals from, or review any decision of, the Competition Commission that may in terms of this Act be referred to it; and
>
> (d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act."

[7] The term "this Act" is defined to include "the regulations".[19] The Minister of Trade and Industry (Minister) may make regulations relating to the functions of the

[14] This is provided for in section 15(1)(c), which is incorporated into section 16(3) by reference.

[15] Administrative penalties and divestiture are dealt with in Part D of Chapter 5, under the heading "Tribunal hearings and orders."

[16] Section 59(1)(d)(iii) of the Act.

[17] Section 59(2) and (2A) of the Act.

[18] Section 60(1)(a) and (b).

[19] Section 1 of the Act. "Regulation" is defined in section 1 as "a regulation made under this Act".

Commission and the Tribunal, including their "procedures".[20] The Minister has done so in the form of rules for each institution.[21] The most pertinent rule in this appeal is rule 39 of the Commission Rules. It reads in relevant part as follows:

> "39. Breach of merger approval conditions or obligations
>
> (1) If a firm appears to have breached an obligation that was part of an approval or conditional approval of its merger, the Commission must deliver to that firm a Notice of Apparent Breach in Form CC 19, before taking any action—
>
> (a) in terms of section 15(1)(c) to revoke that approval or conditional approval;
>
> (b) in terms of section 59 or 60.[22]
>
> (2) Within 10 business days after receiving a Notice of Apparent Breach, a firm referred to in sub-rule (1) may—
>
> (a) submit to the Commission a plan to remedy the breach; or
>
> (b) request the Competition Tribunal to review the Notice of Apparent Breach on the grounds that the firm has substantially complied with its obligations with respect to the approval or conditional approval of the merger.
>
> . . .
>
> (5) The Commission may act in terms of section 15(1) to revoke the approval or conditional approval of a merger referred to in sub-rule (1), or in terms of section 59 or 60, only if—
>
> (a) the firm concerned does not respond to the Notice of Apparent Breach within 10 business days after receiving it, in the manner anticipated in sub-rule (2)."

[8] The remaining provisions of rule 39 deal with the circumstances where a plan has been submitted. In this matter, CCBA opted for a review in terms of rule 39(2)(b). Accordingly, they are not directly relevant.

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[20] Sections 21(4) and 27(2) of the Act.

[21] Rules for the Conduct of Proceedings in the Competition Commission, *GG* 22025, 1 February 2001, as amended (Commission Rules). See also Rules for the Conduct of Proceedings in the Competition Tribunal *GG* 22025, 1 February 2001. Neither set of rules was published with a notice or regulation number.

[22] See the discussion of sections 59 and 60 at para [5] above.

[9] A failure to successfully review a Notice of Apparent Breach does not automatically result in the imposition of revocation or other penalties. Further, Tribunal proceedings against the offending firm are required.[23] Against this statutory background, it is now appropriate to set out the factual background.

Factual background

[10] The dispute has its origins in a large merger that was approved by the Tribunal on 10 May 2016 (merger decision).[24] The merger created a single bottling entity, Coca-Cola Beverages South Africa (Pty) Ltd (CCBSA), from four, previously independent, authorised bottlers for The Coca-Cola Company (TCCC).[25] CCBSA was established as a subsidiary of CCBA. I will refer to CCBSA and CCBA interchangeably as Coca-Cola, unless it is necessary to distinguish between them. Pre-merger, TCCC supplied concentrate and beverage bases to each of the four bottlers.[26] They were Amalgamated Beverage Industries (ABI), Coca-Cola Sabco (Pty) Ltd (Sabco), Coca-Cola Shanduka Beverages South Africa (Pty) Ltd (Shanduka) and Coca-Cola Canners (Pty) Ltd (Canners). The bottlers were each separately authorised to prepare, package, distribute and sell the Coca-Cola products in a particular geographic area. There was no overlap. So the bottlers did not compete.

[11] A number of interested parties participated in the merger proceedings.[27] Negotiations took place between them. The merging parties negotiated settlement

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[23] In this regard, rule 37 of the Tribunal's rules provides in relevant parts as follows:

> "37 Revocation of approval or conditional approval
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> (1) In respect of a merger that has been approved or conditionally approved by the Tribunal, the Commission may file a Notice of Motion in Form CT 6 to revoke the approval or conditional approval of that merger provided, if the proposed revocation is based on section 15(1)(c), that it has taken the steps set out in rule 39 of the Competition Commission Rules."

[24] *Coca-Cola Beverages Africa Limited v Various Coca-Cola and Related Bottling Operations* [2016] ZACT 68 (*Coca-Cola merger decision*).

[25] TCCC is a company incorporated in accordance with the laws of the United States and listed on the New York Stock Exchange.

[26] These are described, along with their holding companies, at paras 21-6 of the *Coca-Cola merger decision*.

[27] *Coca-Cola merger decision* above n 24 at paras 8-9.

agreements with the Minister and FAWU respectively, shortly before the hearing was to commence.[28] The settlements were based on conditions to be attached to the approval of the merger. The Commission was satisfied with them.[29] In considering the merger, the Tribunal agreed with the merging parties that the merger had a neutral impact on competition "as the relevant bottling operations already form part of the TCCC system".[30]

[12] In relation to the public interest, the Commission stipulated a number of employment-related conditions. The Minister raised objections to these. As a result of his intervention, and as observed by the Tribunal, "FAWU successfully negotiated a strengthening of the employment conditions".[31] These were then extended to employees who were members of the National Union of Food, Beverage, Wine, Spirits and Allied Workers (NUFBWSAW) in a separate but identical agreement.[32] On the basis of the agreed conditions, the Tribunal approved the merger.[33] Consequent upon the merger, the consolidated bottling operation was held as to 11.3% by TCCC, 57% by SABMiller plc and 31.7% by Gutsche Family Investments (Pty) Ltd.

[13] The conditions included—

(a) as condition 9.1: the maintenance of the aggregate employee numbers from the four operations, as at approval date, for a period of three years;

(b) as condition 9.2: that no retrenchments of "bargaining unit employees"[34] were to be effected "as a result of the merger" and that retrenchments

[28] Id at para 16.

[29] Id at para 17.

[30] Id at para 34.

[31] Id at para 55.

[32] Id at paras 50-5.

[33] Id at para 56.

[34] "Bargaining unit employees" are defined in the conditions of the *Coca-Cola merger decision* above n 24 at para 1.9 as—

> "those employees of the Merging Parties falling within the respective bargaining units as defined in the various recognition agreements of the Merging Parties in terms of the Labour Relations Act".

outside of the bargaining units were limited to 250 employees in category Hay Grade 12 and above;[35]

(c) as condition 9.4.5: that retrenchments precluded by condition 9 did not include "necessary steps taken by the Merging Parties in terms of section 189 of the Labour Relations Act[36] (LRA) should operational requirements in the ordinary course of business that are not merger specific necessitate that such steps be taken"; and

(d) as condition 11.2: that in the event of any "conflict of interpretation" between the conditions and the union agreements, the agreements would prevail.

[14] Clause 3.2 of the union agreements further required harmonisation of employment conditions across all four bottlers within four years to no less than those attaching to the equivalent posts in ABI, one of the four bottling companies.

[15] A further merger at holding company level was approved on 27 September 2017. This involved the purchase by TCCC of SABMiller plc's 54% shareholding in CCBA. The conditions from the first merger remained in place. The three-year period in condition 9.1, requiring the maintenance of a minimum level of employment, started running afresh from the date of the second merger.

[16] Following the second merger, according to Coca-Cola, things took a turn for the worse. During 2017 economic conditions deteriorated. With effect from 1 April 2018 the Health Promotion Levy on Sugary Beverages, colloquially known as the "sugar tax", was imposed.[37] Input prices, particularly of sugar, rose sharply. Economic

[35] The definition adopted by the Commission in its merger report was as follows:

> "According to the Hay Correlation Table, the positions graded at Hay Grade 12 and above . . . are skilled positions which include the following positions: specialised, skilled, technical specialist and senior supervisory, middle . . . management, high level advisory etc."

[36] 66 of 1995.

[37] The Health Promotion Levy on Sugary Beverages was introduced in terms of the Rates and Monetary Amounts and Amendment of Revenue Laws Act 14 of 2017.

conditions in the country continued to deteriorate. Sales volumes were affected and competitors continued to gain market share. The upshot was that Coca-Cola wrote to the Commission on 19 January 2019 informing it of the challenges faced and warning that retrenchments for operational requirements may be required.

[17] On 21 January 2019 Coca-Cola addressed notices to FAWU and NUFBWSAW in terms of section 189(3) of the LRA.[38] It referred in the notice to the adverse conditions, including the impact of the sugar tax. These developments required it to restructure, particularly within logistical and commercial functions, which would result, amongst others, in the reduction of labour costs. It gave the assurance that there would be "no forced merger-related retrenchments within the bargaining units of the CCBSA group". However, if the proposals to restructure were implemented, retrenchments might be necessary. Before taking any decisions in this regard, Coca-Cola wished to consult on possible measures to avoid or minimise retrenchments, or their impact if they were to take place, and on selection criteria and severance pay if avoiding the

[38] The letter refers to "section 189 (A)", but the letter is clearly the notice contemplated in section 189(3) of the LRA. Section 189(3) reads as follows:

> "(3) The employer must issue a written notice inviting the other consulting party to consult with it and disclose in writing all relevant information, including, but not limited to—
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> (a) the reasons for the proposed dismissals;
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> (b) the alternatives that the employer considered before proposing the dismissals, and the reasons for rejecting each of those alternatives;
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> (c) the number of employees likely to be affected and the job categories in which they are employed;
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> (d) the proposed method for selecting which employees to dismiss;
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> (e) the time when, or the period during which, the dismissals are likely to take effect;
>
> (f) the severance pay proposed;
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> (g) any assistance that the employer proposes to offer to the employees likely to be dismissed;
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> (h) the possibility of the future re-employment of the employees who are dismissed;
>
> (i) the number of employees employed by the employer; and
>
> (j) the number of employees that the employer has dismissed for reasons based on its operational requirements in the preceding 12 months."

retrenchments was impossible. In the event that the retrenchments proceeded, Coca-Cola would use a two-phase approach. Impacted employees would first be given an opportunity to consider voluntary retrenchment or early retirement. If operational requirements were not met thereby, it would move to involuntary retrenchments. Consultations with the unions followed, with the CCMA providing facilitation, presumably, in terms of section 189A(3) to (8) of the LRA.

[18] On 16 April 2019, the Commission notified Coca-Cola that it had received a complaint from FAWU of a breach of condition 9.1 of the merger conditions. It requested information on a number of issues pertaining to the possible retrenchments. Coca-Cola responded on 6 May 2019, pointing out inter alia that the total number of employees continued to exceed the number required in condition 9.1, that commercial, regulatory and operational factors gave rise to the need for retrenchments and that the sugar tax had, in the nine months since its introduction in April 2018, already cost Coca-Cola approximately R2.1 billion. It emphasised that the retrenchments were "for reasons unrelated to the merger" and denied any breach of the merger conditions.

[19] On 28 May 2019, the Commission wrote to Coca-Cola asking it to supplement its response of 6 May 2019. The Commission asked how Coca-Cola intended to maintain the employee headcount, as required by condition 9.1, at the same time as effecting retrenchments. It also wanted to know how the sugar tax was causally linked to the retrenchments. Financial statements and demand volumes were requested.

[20] Coca-Cola responded in a letter dated 7 June 2019.[39] A table provided showed that, whilst the minimum employment level had dropped below the required level for a number of months as a result of "natural attrition" and voluntary retrenchments, recruitment of 1067 employees in May 2019 into "newly created roles" had restored the numbers to above the required minimum by the end of that month. As to the causal link, the retrenchments were required in order to mitigate the losses arising from the

[39] Sent on 10 June 2019.

sugar tax and to ensure profitability. An extract from the 2018 income statement was provided, with comments pointing out that sales volumes had declined by 2%, discounts in order to remain competitive had increased by R850 million, gross profit had decreased by R300 million and the various adverse circumstances had led to a profit decline for a third consecutive year. Coca-Cola expressed its surprise at FAWU's stance, given that FAWU had previously joined it in opposing the sugar tax on account of its potential to cause job losses.

[21] While this exchange of correspondence with the Commission took place, Coca-Cola implemented retrenchments. A considerable number of employees opted for voluntary retrenchment. Ultimately 368 employees from within the bargaining unit[40] were involuntarily retrenched with effect from 31 May 2019. In response, FAWU launched unfair dismissal proceedings in the Labour Court on 6 September 2019, but these appear not to have been persisted in. NUFBWSAW also launched unfair dismissal proceedings in two separate cases. In one of those cases, the Labour Court dismissed the claim and leave to appeal was refused by the Labour Court and Labour Appeal Court. At the time the replying affidavit was filed in this Court, the other case had not been finalised, but it appears that the Labour Court subsequently dismissed the claims of 13 employees and upheld the claim of a fourteenth employee, to whom Coca-Cola was ordered to pay compensation.[41]

[22] On 24 October 2019, and acting in terms of Commission rule 39(1), the Commission issued a Notice of Apparent Breach, presenting Coca-Cola with the two options in rule 39(2)(a) and (b) as referred to earlier. The covering letter alleged that "the retrenchment . . . took place during the moratorium period prescribed in clause 9.2 of the merger conditions". The merged entity was therefore in breach of that clause. Here the letter was in error. Only condition 9.1 has a moratorium period. Condition 9.2 operates indefinitely.

[40] See para 13(b) above.

[41] *National Union of Food Beverage Wine Spirits and Allied Workers v Coca-Cola Beverages South Africa (Pty) Ltd* [2022] ZALCJHB 268.

[23] Coca-Cola's attorneys responded on 11 November 2019 by seeking an extension of the 10-day time limit in rule 39(1) to enable it to "address a formal written submission". The extension was granted. A submission was made on 20 December 2019 setting out Coca-Cola's case, asserting that the retrenchments were not merger specific and requesting that the notice be withdrawn.

[24] On 9 April 2020 the Commission responded. It changed its stance. Now it asserted that (a) Coca-Cola's duty to harmonise terms and conditions and (b) the cost cutting "in the very areas where duplications arose from the merger (i.e. bottling operations)" were the true reasons for the retrenchments, not the sugar tax. This pointed to a complaint based on condition 9.2 rather than 9.1. The Commission also observed that "[c]uriously, in parallel with that retrenchment process, the merged entity hired new employees in the same/similar positions but for less wages and less benefits than the employees who had been retrenched".

[25] A supplementary submission by Coca-Cola's attorneys on 20 April 2020 in response was to no avail. On 29 April 2020, the Commission put Coca-Cola to terms to submit a plan, failing which Coca-Cola would have to approach the Tribunal for appropriate relief. Coca-Cola opted for the latter. On 14 May 2020 it applied to the Tribunal in terms of rule 39(2)(b) to review the notice of apparent breach.

Before the Competition Tribunal

[26] The Tribunal,[42] pointed out that it has general appeal and review powers under section 27(1)(c).[43] However, the Constitutional Court recognised in *Sidumo*[44] that section 33 of the Constitution does not preclude "specialised legislative regulation of

[42] *Coca-Cola Beverages Africa (Pty) Ltd v Competition Commission of South* Africa [2021] ZACT 101 (*Tribunal decision*).

[43] Id at para 32.

[44] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC).

administrative action".[45] Rule 39(2)(b) provides for "a separate and context specific form of review" to determine breaches of merger approval conditions.[46]

[27] The Tribunal reasoned as follows. As regards the test for determining whether the retrenchments were "as a result of the merger" or "merger specific", the Tribunal referred to *Aveng*.[47] That judgment concerned whether the reason for certain dismissals was a refusal by employees to accept a demand of the employer on a matter of mutual interest (which would have rendered the dismissals automatically unfair in terms of section 187(1)(c) of the LRA) or whether the reason was Aveng's operational requirements. The Tribunal in the present case considered that the "delictual test" for causation adopted in the first judgment in *Aveng*[48] to ascertain the true reason for the retrenchments was inappropriate in the present context.[49] The approach in the second judgment in *Aveng*[50] was to be preferred. The latter approach characterises the enquiry as one related simply to proof. Where conflicting reasons are proffered for the retrenchments, the true reason for them is a factual question to be resolved on the probabilities, applying *Stellenbosch Farmers' Winery*.[51] This approach, in the Tribunal's view, was consistent with the Tribunal's judgment in *BB Investment.*[52]

[28] The argument that the retrenchments sought to undermine the harmonisation obligation arising from the merger did not hold, according to the Tribunal, because,

[45] Id at para 91.

[46] Id at para 35.

[47] *National Union of Metalworkers of South Africa v Aveng Trident Steel (a division of Aveng Africa (Pty) Ltd)* [2020] ZACC 23; (2021) 42 ILJ 67 (CC); 2021 (2) BCLR 168 (CC).

[48] Id at paras 69-92. The Court divided evenly on the test for determining the reason for the dismissal.

[49] *Tribunal decision* above n 42 at para 42.

[50] Id at paras 106-136.

[51] *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* [2002] ZASCA 98; 2003 (1) SA 11 (SCA) (*Stellenbosch Farmers' Winery'*).

[52] *BB Investment Company (Pty) Ltd v Adcock Ingram Holdings (Pty) Ltd* [2014] 2 CDLR 451 (CT) (*BB Investment*).

amongst other things, there was no evidence to show that the replacement of higher-paid employees with those who were lower-paid had in fact impacted on the harmonisation.[53]

[29] The Tribunal accepted that, if the retrenchments had been aimed at removing positions that were duplicated as a result of the merger, this would be merger specific.[54] However, there was "insufficient evidence to demonstrate that a principal reason for the retrenchments was the removal of duplicate roles" arising from the merger.[55] The probabilities favoured Coca-Cola's reasons for the retrenchments, namely the need to reduce costs to address the impact of the sugar tax, adverse macroeconomic circumstances and rising input prices.[56] The Tribunal accordingly granted an order declaring that Coca-Cola had substantially complied with condition 9.2 and set aside the notice of apparent breach.

Before the Competition Appeal Court

[30] The Commission appealed to the Competition Appeal Court.[57] That Court identified, as the main questions for decision, the nature of the review under section 27(1)(c) read with rule 39(2) and the correct test for deciding whether retrenchments were "merger specific" rather than due to operational requirements.[58] As regards the test on review, the Competition Appeal Court held that the Tribunal had erred in holding that section 27(1) conferred anything other than ordinary review powers.[59] It said that the decision to issue a Notice of Apparent Breach is administrative action.[60] The Competition Appeal Court said that, although the Tribunal had held that the rule 39(2) enquiry "necessarily involves whether the decision to issue the notice is

[53] *Tribunal decision* above n 42 at para 62.

[54] Id at para 57.

[55] Id at para 76.

[56] Id at para 79.

[57] *Competition Commission v Coca-Cola Beverages Africa (Pty) Ltd* [2022] ZACAC 4; (2022) 43 ILJ 1971 (CAC) (*CAC judgment*).

[58] Id at para 1.

[59] Id at para 54.

[60] Id at para 55.

lawful, reasonable and procedurally fair", it had only "paid lip service to its own injunction".[61] The question was whether the Commission acted reasonably in deciding that there was an apparent breach.[62]

[31] The Competition Appeal Court criticised the Tribunal for imposing an evidentiary burden on the Commission, because the merged party had the full facts and should be able to demonstrate compliance with the merger conditions if that was the case.[63] Further, it said that the correct approach to causation was the test laid down in *BB Investment*. That is, "an outcome that can be shown as a matter of probability to have some nexus associated with the incentives of the new controller".[64] Adopting a "causal connection" or "principal reason" test would erode the safeguards afforded to employees by section 12A(3) of the Act.[65]

[32] This nexus, the Competition Appeal Court said, quoting the Tribunal in *BB Investment*, is more easily established where merging firms are engaged in overlapping activities.[66] It said that the letter of 20 December 2019 from Coca-Cola's attorneys, acknowledging that the retrenchments "sought to reduce the cost of employment . . . including the removal of unproductive duplication of roles", was significant. The Competition Appeal Court found compelling the Commission's argument that—

> "where . . . a merger involves four entities, there will be a well-founded expectation of duplication, and incentive on the part of the merged entity to retrench. Based on *BB Investment*, the probability of a nexus will be accentuated and easily established

[61] Id at para 56.

[62] Id at para 62.

[63] Id at para 69.

[64] Id at para 82.

[65] Id at para 83.

[66] Id at para 84; *BB Investment* above n 52 at para 60.

> because it is not likely that a firm would continue to employ more people for a job that requires one person."[67]

[33] The Competition Appeal Court noted that, despite the extended operation of the conditions following the second merger, TCCC as the new controller effected the retrenchments.[68] It said that "[t]he incentives of the new controlling shareholder are highly implicated in the circumstances".[69] The Competition Appeal Court accordingly overturned the decision of the Tribunal and ordered Coca-Cola to pay the Commission's costs.

In this Court

Issues

[34] The main issues raised are these:

(a) Is this Court's jurisdiction engaged on the substantive issues identified below?

(b) Is it in the interests of justice to grant leave to appeal?

(c) What is the nature and standard of the review under rule 39(1) and (2) of the Commission Rules?

(d) Where merger approval is conditional on there being no retrenchments as a result of the merger, what is the test for determining whether subsequent retrenchments are causally linked to the merger or merger specific?

(e) Was the Competition Appeal Court entitled to interfere in the Tribunal's factual findings?

[67] Id at para 87.

[68] Id at para 88.

[69] Id.

Jurisdiction

[35] The application raises constitutional matters.[70] Section 33(3)(a) of the Bill of Rights requires the passing of legislation that gives effect to the right of judicial review of administrative action before a court or impartial tribunal.[71] Here national legislation, the Competition Act, confers a general power of review on a tribunal. Subordinate legislation under it arguably creates a bespoke form of review. How is the subordinate legislation to be interpreted in relation to both the national legislation and the right to administrative justice in the Promotion of Administrative Justice Act[72] (PAJA), in determining the nature and standard of review? This is a constitutional question.

[36] The matter also raises arguable points of law of general public importance.[73] What is the test when the Tribunal decides under rule 39(2) whether a firm has substantially complied with a merger condition imposed under section 12A(3)(b) of the Act which restricts retrenchments? That in turn raises questions in regard to the test for causation that are similarly points of law of general public importance.

Leave to appeal: interests of justice

[37] As pointed out by Zondo J (as he then was) in *Dengetenge*[74]—

> "[t]his court grants leave to appeal if it is in the interests of justice to do so. The factors that it normally takes into account include the importance of the issues raised by the matter, the prospects of success and the public interest."[75]

[70] The first jurisdictional basis in section 167(3)(b)(i) of the Constitution.

[71] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [2022] ZACC 44; 2023 (4) SA 325 (CC); 2023 (5) BCLR 527 (CC) at para 237.

[72] 3 of 2000.

[73] The second jurisdictional basis in section 167(3)(b)(ii) of the Constitution. On the interpretation of this provision, see *Paulsen v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) at paras 13-28.

[74] *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd* [2013] ZACC 48; 2014 (5) SA 138 (CC); 2014 (3) BCLR 265 (CC).

[75] Id at para 52.

[38] For reasons that will become apparent below, the appeal has reasonable prospects of success. The matter raises important issues pertaining to the test on review in terms of rule 39(1) and (2) of the Commission Rules and the test for a causal nexus between a merger and retrenchments. The Tribunal and the Competition Appeal Court relied on the same Tribunal authority (mainly *BB Investment*) on the test for causal nexus, but came to different conclusions in this regard. This creates uncertainty in an important area of the regulation of the economy, that impacts beyond the immediate parties to the dispute. A judgment of this Court may help to resolve it. It is accordingly in the public interest that the matter be considered. As said in *Pickfords*[76]—

> "[t]he matter raises novel and complex questions that this Court has not as yet pronounced on. And, as will be seen later, there are strong prospects of success. It is therefore in the interests of justice that leave to appeal be granted."[77]

[39] There is a complaint that the applicant shifted ground in the Tribunal, Competition Appeal Court and this Court, with the consequence that new arguments are advanced for the first time in this Court. On this basis, the Commission argued that leave should be refused.

[40] However, the primary stance of the applicant in this Court as to the nature and standard of review was set out in its founding affidavit in the Tribunal. The argument of the applicant on appeal to this Court, that the review is a special statutory review, is entirely consistent with the reasoning of the Tribunal. So it is not a point argued for the first time in this Court. Likewise, the test for causation was considered in both the Tribunal and the Competition Appeal Court. No substantial prejudice has been demonstrated by the Commission arising out of the shifting stance of Coca-Cola.

[41] I am accordingly satisfied that leave to appeal should be granted. A consideration of the merits follows.

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[76] *Competition Commission of South Africa v Pickfords Removals SA (Pty) Limited* [2021] ZACC 49; 2020 (10) BCLR 1204 (CC); 2021 (3) SA 1 (CC).

[77] Id at para 18.

Merits

Applicant's submissions

[42] Coca-Cola, in the main, supports the reasoning of the Tribunal. The review contemplated by rule 39(2) is, it submits, a special statutory review in which the sole question, to be decided afresh, is whether in fact the firm has substantially complied with its merger conditions. It submits that it is not a conventional administrative law review of the Commission's decision to issue the notice, based on whether it was lawful, reasonable and procedurally fair. The Competition Appeal Court, Coca-Cola argues, erred in holding otherwise.

[43] The test for causation in this instance is, according to Coca-Cola, the same as that applied in the law of insurance. Coca-Cola submits that factual causation, based on the question "but for the merger would the retrenchments have taken place?", is the first inquiry. If so, one must then ask whether the merger was the proximate, real or dominant cause.[78] The Tribunal's test which sought the "true reason" for the retrenchments was akin to this. The Competition Appeal Court, so Coca-Cola argues, erred in applying a test that sought only "some nexus associated with the incentives of the new controller". On the facts, the merger did not cause the retrenchments. Their proximate, real and dominant cause was the adverse circumstances that Coca-Cola referred to.

Respondent's submissions

[44] The Commission supports the reasoning of the Competition Appeal Court on both the nature of the review and the test for causation. It submits that, on Coca-Cola's approach, the rule 39(2) review is a reconsideration or appeal, which is inconsistent with the use of the word "review" in rule 39(2)(b) and with our legal system's steadfast insistence on drawing a clear distinction between appeal and review.

[78] *Guardrisk Insurance Co v Café Chameleon CC* [2020] ZASCA 173; 2021 (2) SA 323 (SCA) (*Guardrisk Insurance*) at paras 37-40.

[45] On merger specificity, the test is objective, so submits the Commission. One asks if there was an incentive on the part of the new controller to engage in retrenchments. If so, the merged entity must put up evidence to show that the retrenchments were motivated by something other than the merger, such as operational reasons. This balances the rights of employee and employer.

[46] Here four firms carrying out overlapping functions were collapsed into one, so duplication was, according to the Commission, to be expected and there was an incentive to retrench. Yet no adequate explanation was provided by Coca-Cola. Indeed, its attorneys' submission of 20 April 2020 conceded that certain of the retrenchments were occasioned by the removal of duplication. The Competition Appeal Court did not interfere impermissibly with the Tribunal's factual findings.

The nature and standard of review

[47] The particular review remedy in question is created exclusively by rule 39(1) and (2).[79] No party has challenged its constitutional validity. The rule must therefore be taken as valid. Its meaning must be discerned based on the interpretive requirements emanating from section 39(2) of the Constitution, paying particular attention to its text and always having due regard to its context and purpose.[80] Applying section 39(2) requires that the values of fairness and justification[81] underlying the right to administrative justice in section 33 be promoted. As to purpose, the rule manifests a proactive approach to ensuring compliance with merger conditions. As soon as it appears to the Commission on the basis of its investigations that there is a breach, it must raise a flag. If the firm acknowledges the breach, a plan must quickly be submitted

[79] Rule 39 is set out in relevant part in para 7 above.

[80] *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) (*Chisuse*) at paras 46-59 and the authorities there referred to.

[81] Mureinik "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *SAJHR* 31 at 32, often cited in the judgments of this Court – see for example *Chisuse* above n 80 at para 18.

and agreed to remedy it. If it does not, a procedure is available to test this expeditiously, but fairly.

[48] As to context, this must take into account the Rules' source in the Act, namely sections 21(4) and 27(2). They empower the Minister to make regulations for matters relating to the functions of the Commission and the Tribunal respectively. This includes the power to make regulations for their "procedures".[82] Context must also factor in the parts of the statute that lay down the Tribunal's powers.

[49] The Competition Appeal Court approached the matter on the basis that the relevant empowering provision was section 27(1)(c), which empowers the Tribunal to "review any decision of the Competition Commission". The Competition Appeal Court appeared to regard section 27(1)(c) as predominating in the interpretive process because "it is not permissible to look to . . . rule 39 to give scope and meaning to the Act which created the rule". The Competition Appeal Court was of the view that section 27(1)(c) contemplated only an "ordinary" judicial review of administrative action, here constituted by the Commission's decision to issue the rule 39(1) notice. Rule 39 had to be interpreted accordingly.

[50] At the level of context, there are the following difficulties with this approach:

(a) This leaves out of account that the Minister has the power under the Act to prescribe regulations that include "procedures" relating to the functions of the Commission.

(b) It overlooks section 27(1)(b), which separately confers on the Tribunal the power to "adjudicate on any other matter that may, in terms of this Act,[83] be considered by it". This wording would cover the performance by the Tribunal of the review function provided for in rule 39(2).

[82] Section 21(4)(h).

[83] The words "the Act" are italicised in the original statute to show that the definition in section 1 applies. That definition includes regulations made in terms of the Act as part of the statute.

(c) Even if it did not, the word "review" is employed as a verb in section 27(1)(c) in a way that is wide and unqualified. It applies to the review of "any decision of the . . . Commission that may in terms of this Act[84] be referred to it". This could include any review under the Act and Rules, whatever its particular characteristics. It is a generic or umbrella empowering provision that does not dictate the nature of each review falling within its ambit.

[51] On this basis, the meaning of section 27(1)(c) is not dictated by the particular features of the review under rule 39(2)(b), as suggested by the Competition Appeal Court. Section 27(1)(c) would readily include a special statutory review. It is a form of review that is well recognised in South African administrative law.[85] In this regard, Hoexter and Penfold[86] say the following:

> "The legislature may and often does confer on the courts a statutory power of review. This is 'special' because it differs from 'ordinary' judicial review in the administrative-law sense. The adjective also helps to distinguish other statutory reviews from PAJA review, which is of course statutory too.
>
> Statutory review is often a wider power than ordinary review, and thus more akin to an appeal, but it may well be narrower, *with the court being confined to particular grounds of review* or particular remedies. While in *Johannesburg Consolidated Investment Co*[87] Innes CJ spoke of the statutory review power as being 'far wider' than the first two kinds of review mentioned by him, it is clear that the precise extent of the power always depends on the particular statutory provision concerned." (Emphasis added.)

[84] Again these two words are italicised in the original statute to show that the definition in section 1 applies.

[85] See below.

[86] Hoexter and Penfold *Administrative Law in South Africa* 3 ed (Juta & Co Ltd, Cape Town 2021) at 143-4, 154-6. They also cite *Nel N.O. v The Master* [2004] ZASCA 26; 2005 (1) SA 276 (SCA) at para 23 and *Fesi v Ndabeni Communal Property Trust* [2018] ZASCA 33; [2018] 2 All SA 617 (SCA) at para 54.

[87] *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 116.

[52] As to text, the wording of rule 39(1) and (2) is largely left out of account in the judgment of the Competition Appeal Court. Yet, the following features of the wording are significant:

(a) The words "appears" and "apparent" in the introductory part of subsection (1) are all-important. As soon as there is the appearance of a breach of a condition, the Commission is obliged to act in terms of the rule by placing the firm on terms either to submit a plan to remedy the breach or to "review the Notice of Apparent Breach".

(b) The relevant dictionary definition of "appear" in this context is as follows: "Seem to the mind, be perceived as, be considered; seem outwardly or superficially (but not in reality)".[88]

(c) Rule 39(1), in providing for the delivery of a Notice of Apparent Breach, is not framed as a self-contained, discretionary decision-making provision. It is more in the nature of a notification of intended action, or a precursor to a decision-making process.

(d) Rule 39(2)(b) provides for the review of the notice, not the underlying decision of the Commission to issue it.

(e) It sets out a single basis for the envisaged review, that is, proof to the Tribunal that the accused firm "has substantially complied with its obligations with respect to the . . . conditional approval of the merger".

(f) It contains no provision for remittal to the Commission for decision afresh if the firm is successful.

(g) It is framed so as to be objectively justiciable, requiring the applicant to demonstrate actual substantial compliance, rather than to demonstrate any flaws in the procedure or reasoning process of the Commission.

(h) And, finally, rule 39(2)(b) is at once both broad and narrow – whilst it limits the applicant to a single review ground, on its clear terms there is a full opportunity to prove to the Tribunal substantial compliance with the merger condition.

[88] Kendall J *Shorter Oxford English Dictionary on Historical Principles* 6 ed vol 1 (Oxford University Press, Oxford 2007) at 101.

[53] Nor is a decision on the merits by a court or tribunal on review, as the text of section 39(2) seems to require, an alien concept in administrative law. This category of reviews was recognised 120 years ago in *Johannesburg Consolidated* as conferring the power to decide the matter *de novo* (afresh).[89] Deciding a matter on the merits is to a degree what takes place when a court substitutes its decision for that of the decision-maker in terms of section 8(1)(c)(ii)(aa) of PAJA, albeit on the basis of the evidence already before a court. A more intrusive and less-deferential degree of review is appropriate where the reviewing court or tribunal enjoys specialised expertise in the area in question. The Tribunal is a specialist adjudicator in the competition field and is well-acquainted with the applicable law, economics and policy.[90]

[54] Taking into account the foregoing analysis, and viewed holistically, rule 39 operates as follows:[91]

(a) The Commission receives information that a firm may have breached a merger condition.

(b) It might seek the comment of the firm on this information to see if there is an innocent explanation. Whether or not it is compelled to do so need not be decided here.

(c) If it appears on the basis of the information that there has been a breach, then the Commission issues a Notice of Apparent Breach to the firm. The

[89] Id at page 117. The judgment must be read subject to the qualification referred to by Hoexter and Penfold (see paragraph 51 above) to the effect that each statutory review power must be interpreted on its particular wording. Such a power might not be conferred if the wording of the statute suggests as much. Examples of special statutory reviews that involve a decision on or full reconsideration of the merits include those in section 151 of the Insolvency Act 24 of 1936 and sections 35(10) and 95 of the Administration of Estates Act 66 of 1965.

[90] See in this regard *A.C. Whitcher (Pty) Ltd v Competition Commission of South Africa* [2009] ZACAC 2 where the Competition Appeal Court said at para 24:

> "[A]s David Mullan 2006 *Acta Juridica* 42 at 50 has noted, an important criterion in assessing the level of deference owed in a review application is the expertise of the reviewing court relative to that of the administrative body. In this case, the Tribunal has significant economic expertise and knowledge of competition matters. It was set up for the purpose of constituting a specialist body. It is in an entirely different position from a general court, whose members are not appointed, as is the case with those of the Tribunal, because of their specific expertise in the field upon which they are called to review."

[91] I leave out of account here the scenarios where the firm opts to submit a remedial plan, but fails to co-operate in adapting it to the satisfaction of the Commission or in implementing it. See rule 39(3) to (5).

Notice will have to provide sufficient information for the firm to be able to appreciate the nature of the breach complained of.

(d) The firm then has an election. If it concedes the breach, rule 39(2)(a) affords it the opportunity to submit a remedial plan. If it does not concede the breach, it may request the Tribunal to review the Notice of Apparent Breach.

(e) Rule 39(2)(a) then provides a single permissible ground for the review, namely that the firm has substantially complied with its obligations; in other words, that there was no breach. That is then the objective inquiry that the Tribunal undertakes.

(f) The firm must place the requisite evidence before the Tribunal to demonstrate substantial compliance. It bears the onus. If it discharges the onus, that is the end of the matter.

(g) If it fails to discharge the onus, the Commission may proceed to take action against the firm in terms of section 15(1)(c), 59 or 60 of the Act.

[55] The decision of the Tribunal in this matter is largely consistent with this approach to the interpretation of rule 39(1) and (2) and the review standard contemplated by it. The judgment of the Competition Appeal Court is not. The Competition Appeal Court's confinement of the review to assessing whether the Commission acted lawfully, reasonably and procedurally fairly in deciding to issue the Notice of Apparent Breach is irreconcilable with the specific wording of rule 39(2)(b) – in fact it ignores it and replaces the special review ground it stipulates with the ordinary administrative-law review grounds. To do this is to legislate, not adjudicate, something the Constitution does not permit.[92]

[56] The Competition Appeal Court's interpretation has potentially grave and unjust consequences for a merged firm. The firm may have to provide and implement a plan

[92] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) at para 18. Endorsed in *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (2) BCLR 165 (CC); 2019 (5) SA 1 (CC) at para 29.

for remedying the apparent breach or face punitive proceedings for revocation, an administrative penalty or, possibly, divestiture,[93] in circumstances where the Commission reasonably but wrongly believed there to have been a breach; or where there was an apparent, but not an actual breach. That would sanction an injustice and a breach of the rule of law. There is no support in the Act for holding a firm liable on the basis of an *apparent* breach. Section 15(1)(c), 59(1)(d)(iii) and 60(1) all require an actual breach.

[57] The Competition Appeal Court's approach provides no convincing basis for rejecting the conception of rule 39(1) and (2)(b) as providing for a special statutory review. Accordingly, the Competition Appeal Court's judgment cannot stand on this aspect. The test for review is simply that laid down in the text of rule 39(2)(b) – objectively, has Coca-Cola substantially complied with its obligations under the conditions attached to the merger?

The test for causal nexus or merger specificity

[58] The Tribunal rejected what it described as the "delictual test" involving the two-stage enquiry into factual and legal causation.[94] Its test for determining whether there was a sufficient nexus between the merger and the retrenchments for a finding of breach of the merger conditions was to ask whether, on an assessment of the probabilities, the preceding merger, on the one hand, or the alleged operational

[93] See rule 39(1)(a) and (b) of the Commission Rules and the sections of the Act referred to there.

[94] Although nothing ultimately turns on this, the Tribunal was incorrect in characterising the two-stage test for causation as applying only to the law of delict. As was pointed out in *Napier v Collett* [1995] ZASCA 44; 1995 (3) SA 140 (A) at para 143E-G—

> "Despite the differences between various branches of the law, the basic problem of causation is the same throughout. The theoretical consequences of an act stretch into infinity. Some means must be found to limit legal responsibility for such consequences in a reasonable, practical and just manner."

The theoretical consequences of an act are those that would be identifiable through the but-for test. Finding the means to limit legal responsibility is what takes place in assessing legal causation or finding the legal cause of the harm or other consequences complained of. The two-stage enquiry thus applies across the different branches of the law.

requirements, on the other, was the true reason for the retrenchments. It adopted this approach from the following passage in the second judgment in *Aveng*:

> "The determination of the true reason for the dismissal appears to me to be simply a matter of fact, which is established in accordance with the rules applicable to the evaluation of evidence. Where an employee proffers a contrary version regarding the true reason for the dismissal, a court must resolve the dispute of fact by evaluating the evidence and by making a finding as to which of the two versions is to be preferred on a preponderance of probabilities, and why. Where there are two conflicting, irreconcilable versions before it, a court must apply the well-established approach laid down in *Stellenbosch Farmers' Winery*."[95]

[59] The Competition Appeal Court rejected the Tribunal's approach. To seek the "true reason" would, in its view, erode the safeguards afforded to employees by section 12A(3) of the Act. The Competition Appeal Court preferred, as a test, asking whether there is "some nexus between the retrenchments and the merger" or, as stated in *BB Investment*, whether the "outcome . . . can be shown, as a matter of probability, to have some nexus associated with the incentives of the new controller".[96] There are at least the following difficulties with the Competition Appeal Court's test.

[60] Firstly, given that the effect of a merger is generally that the newly-merged firm attains control over the enterprise, there will always be "some nexus" between the merger, on the one hand, and the incentives of, and subsequent decisions and outcomes in, the merged enterprise. This is so even if there are other more immediate, more logical or more dominant reasons for them. On an approach that only requires "some nexus", a finding of merger specificity and breach is inevitable. Its effect is to treat the "but-for" enquiry as a complete test for causation.

[61] Secondly, to link outcomes with *incentives* in the present context is not entirely appropriate. In *BB Investment*, the Tribunal was concerned with whether retrenchments

[95] *Aveng* above n 47 at para 119.

[96] *BB Investment* above n 52 at para 56.

that were foreshadowed post-merger would be merger specific. An examination of incentives is appropriate in those circumstances. Here we are concerned with retrenchments that have already taken place. Whilst evidence of incentives would be relevant, it is actual decisions and conduct of the merged firm that must be tested for a causal nexus with the merger. Moreover, the test must be applied at the time of the alleged breach, taking into account all that has transpired since the merger, including the time lapse. The longer the lapse, the less probable the link with the merger.

[62] Thirdly, the test extracted by the Competition Appeal Court from *BB Investment* is only part of the test actually applied in that case. The nature of the test laid down there can only be discerned if regard is had to it in full.[97] This includes, as part of the

[97] The full test is set out at paras 54-67 of *BB Investment* as follows:

> "54. The public interest requirements in section 12A(3) of the Act are implicated only if the 'merger will have an effect on . . .' the various factors which are then listed, amongst which, relevant to this case, is employment. This requirement has been interpreted in the case law as founding jurisdiction to intervene on public interest grounds if the effect is 'merger specific'.
>
> 55. What does merger specific mean?
>
> 56. It means conceptually an outcome that can be shown, as a matter of probability, to have some nexus associated with the incentives of the new controller.
>
> 57. But firms are dynamic institutions. Not every change that results post-merger is necessarily attributable to the merger. Such an approach is far too mechanistic. Thus, we can conceive of changes in a firm's behaviour even post-merger that would have happened in any event and can be thought of as not being merger specific.
>
> 58. Translated to considerations of the public interest effect on employment, the practice thus far has been to distinguish, post-merger, between employment loss associated with the merger nexus, referred to as 'merger specific' employment loss and those in the second category of non-merger specificity, often referred to as 'operational' employment loss.
>
> 59. The Competition Act intervention is jurisdictionally premised on the former 'merger specific', but not the latter 'operational kind', which is considered to be purely the sphere of labour law.
>
> 60. Most cases where we have imposed conditions relating to employment have involved firms with overlapping activities. Here the nexus is more easily established because the inference of merger specificity is highly probable, when merging firms are engaged in overlapping activities. Why would the firm continue to employ two people to do the same job, when employing one would suffice?
>
> 61. The nexus becomes more complicated evidentially, but not conceptually, and this distinction is important not to lose sight of, when the target firm and its acquirer do not have overlapping activities, as in the present case.
>
> 62 Does this mean that in the absence of merger created overlaps we can never determine that employment loss is merger specific? We think such an approach would be going too far. It may well be that a particular controller may be more likely to shed jobs than others and hence have an incentive to cut jobs than might another firm or the target firm's management prior to the merger.

test, examination of the "pre-merger counterfactual",[98] that is, what would have happened if the merger had not taken place; and whether the impugned decision-making was "sufficiently closely related to the merger".[99] These paragraphs were not fully considered, nor were they applied in the Competition Appeal Court's judgment.

[63] Finally, the test for a breach of a merger condition must be applied in the context of, and with due regard to, the purpose and wording of the Act, which contemplates an *actual* breach of a condition before punitive action may be taken.[100] Of particular importance is the wording of the merger condition. A merger condition that contemplates breach only where retrenchments are "as *a result of* the merger", or "merger *specific*" is incompatible with a test based on "some nexus". Can it be said that there is a breach where the *principal* reason for the firm's actions had nothing to do with the merger? The answer must surely be "no". Yet this is the effect of the Competition Appeal Court's test.

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63. In *Walmart* the Tribunal decided that an acquiring firm's history as being hostile to collective bargaining justified imposing a condition on the merged firm to protect existing collective bargaining rights.

64. This case was taken on appeal and one of the issues related to the protection of employees who had been retrenched prior to the notification of the merger. Despite this not being a case where there was evidence of redundancies, and where the merger had not been implemented, the Court nevertheless ordered their reinstatement holding:

> 'A retrenchment, which takes place shortly before the merger is consummated may raise questions as to whether this decision forms part of the broad merger decision making process and would, accordingly, be sufficiently closely related to the merger in order to demand that the merging parties must justify their retrenchment decision.'

65. Although in Walmart the employees in question had already been retrenched, the CAC's reasoning would apply equally to contemplated retrenchments. We recognise however that the evidence would need to be robust to justify such a conclusion.

66. In competition analysis in mergers we typically compare the pre-merger counterfactual with that of the post-merger scenario. Such an approach seems equally sound in evaluating the public interest provided any inferences sought to be drawn are arrived at carefully.

67. On this approach, pre-merger management plans in operation already or proposed may be useful to compare to the plans the firm has post-merger if available. If the differences are stark, and particularly if the change in plans takes place within a short period of time, then it is reasonable to infer that the post-merger plans of the acquirer reflect a different set of incentives to those of the pre-merger management and hence can be considered merger specific."

[98] *BB Investment* above n 52 at para 66.

[99] Id at para 64, citing *Walmart Stores Inc v Massmart Holdings Limited* [2011] ZACT 429 (*Walmart)*.

[100] See para 56 above.

[64] It is important to bear in mind that *Aveng* was decided in the context of section 187(1)(c) of the LRA. It expressly requires the question to be asked whether "*the reason for the dismissal* is . . . a refusal by employees to accept a demand in respect of any matter of mutual interest".[101] The second judgment in *Aveng* was at pains to emphasise this wording as a distinguishing feature in deciding that the ordinary two-stage causation test did not apply.[102] Here we are principally concerned with the wording of condition 9.2 which obliged Coca-Cola "not [to] retrench any Bargaining Unit Employees *as a result of* the Merger" and condition 9.4.5, which in effect permits retrenchments that are not "merger specific".

[65] The phrase "as a result of" is recognised causal terminology.[103] In the context of a statute containing this phrase, it has been held to invoke the two-stage enquiry into factual and legal causation, but subject to a constitutionally compliant, purposive and context-sensitive approach to the interpretation of the instrument in which the words are to be found.[104] In the contractual setting, the approach to causation was described in *Concord Insurance*[105] as follows:

> "Legal causation is not a logical concept and the law does not ascribe causative effect to every logical *sine qua non* (cf *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-I). Basically this is so because complex legal questions – often involving considerations of policy – cannot be solved satisfactorily by a general positive application of the simple logical proposition that a particular fact or state of affairs cannot be regarded as the cause of another unless the former is a *sine qua non* for the latter. Such questions usually arise where several factors concurrently or

[101] Emphasis added.

[102] *Aveng* above n 47 at paras 117, 119 and 129.

[103] Hart and Honoré *Causation in the Law* 2 ed (Clarendon Press, Oxford 1985) at 87. The Court in *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) (*Goedgelegen*) at paras 48-55 and 67-9 confirmed that "as a result of" in section 2(1) of the Restitution of Land Rights Act 22 of 1994 requires a "causal enquiry", but emphasised the importance of nonetheless ensuring a constitutionally compliant, purposive and context-sensitive approach to the interpretation of the statute in which the words are to be found.

[104] See also *Minister of Land Affairs v Slamdien* 1999 (4) BCLR 413 (LCC); [1999] 1 All SA 608 (LCC) at paras 35-9, referred to by this Court in *Goedgelegen* at footnotes 44 and 45. See also the authorities referred to in *Slamdien* at paras 36-9.

[105] *Concord Insurance Co Ltd v Oelofsen N.O.* 1992 (4) SA 669 (A).

> successively contribute to a single result and it is necessary to decide whether any particular one of them is to be regarded legally as a cause. In criminal law and the law of delict legal policy may provide an answer but in a contractual context, where policy considerations usually do not enter the enquiry, effect must be given to the parties' own perception of causality lest a result be imposed upon them which they did not intend."[106]

[66] In the more recent case of *Guardrisk Insurance,*[107] the Supreme Court of Appeal was concerned with an insurance policy that indemnified the insured for "loss . . . *resulting* in interruption (of) the business due to notifiable disease". The question was whether the policy indemnified the insured against losses caused by the lockdown consequent upon the Covid-19 pandemic.[108] The Supreme Court of Appeal said that "[t]he general approach to causation also applies to insurance law" and begins with factual causation as the first enquiry and legal causation as the second.[109] It said that "[i]n the contractual context it has long been accepted that causation rules should be applied 'with good sense to give effect to, and not to defeat the intention of the contracting parties"[110] and went on to hold that the legal causation enquiry involved identifying a proximate cause . . . as a matter of "reality, predominance [and] efficiency".[111] That in turn is ascertained by "applying good business sense". These judgments in my view correctly state the approach to causation in a contractual setting.

[67] The setting in which the causation enquiry arises in this case is an amalgam of statute and contract – statute because the rule 39 enquiry is a precursor to sanction under the relevant sections of the Act; and contractual because the merger conditions imposed by the Tribunal were the product of written agreements between Coca-Cola and the

[106] Id at 673H-674B.

[107] *Guardrisk Insurance* above n 78.

[108] Id at paras 3-4.

[109] Id at paras 37-43.

[110] Id at para 39.

[111] Id at para 48.

trade unions. The first enquiry is one based purely in logic. It is in the second enquiry that the contemplation of both the Legislature and the parties must be ascertained.

[68] Textually, the exclusion in condition 9.4.5 from the prohibition on retrenchments of those that are not "merger-*specific*" points to the need to link the retrenchments directly, or at least predominantly, to the merger for there to be a breach. Contextually, the circumstances in which these merger conditions were formulated included that they had been strengthened in the employees' favour.[112] That strengthening may well have been motivated by concerns about the high level of unemployment in South Africa. That aligns with the likely purpose of section 12A(3)(b) of the Act. Strict compliance with the conditions would therefore be expected of Coca-Cola. And close scrutiny of its conduct would follow if a breach was alleged. At the same time a context-sensitive approach must take into account the severe impact of the consequences that would flow in terms of the Act in the event that Coca-Cola was found to be in breach. This calls for a blend of rigour and fairness in applying the second leg of the causation enquiry.

Did the Tribunal apply the causation test correctly?

[69] Although the wording of the conditions did not in my view warrant the application of the second judgment in *Aveng*, the Tribunal ultimately asked itself the right questions. It said, quoting *BB Investment*, that—

> "'firms are dynamic institutions' and 'not every change that results post-merger is necessarily attributable to the merger'. That approach it held 'is far too mechanistic' and changes can be conceived of 'a firm's behaviour even post-merger that would have happened in any event and can be thought of as not being merger specific'".[113]

[70] That observation on the part of the Tribunal aligns with the but-for test, the first stage of the enquiry. In then seeking to identify the "true reason" for the retrenchments,

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[112] An indication of this is condition 11.2, which provides:

> "In the event of any conflict in interpretation between the terms of these conditions and the Union Agreements, the terms of the Union Agreements shall prevail."

[113] *Tribunal decision* above n 42 at para 47, quoting *BB Investment* above at n 52 at para 57.

the Tribunal tested for the requisite link between the merger and the retrenchments and found this wanting. Its reasoning was consistent with the authorities relating to the test for causation in the contractual and statutory settings. The Tribunal's analysis of the facts[114] reflected the rigour and fairness required in the context of these particular conditions, as is elaborated upon below. To the extent explained above, the Competition Appeal Court was accordingly wrong in finding that the Tribunal applied the incorrect test for a causal nexus.

Was the Competition Appeal Court entitled to interfere in the Tribunal's factual findings?

[71] As pointed out by this Court in *Mediclinic*,[115] the Competition Appeal Court "does not have unbridled powers to interfere with the decision of the Tribunal",[116] particularly in relation to the latter's findings of fact. In *Mediclinic*, this Court applied the Competition Appeal Court's reasoning in *Imerys*.[117] *Imerys* holds that the Competition Appeal Court must take into account the composition, role and expertise (on policy, financial and economic issues) of the Tribunal and apply a measure of deference to it. Additionally, the Competition Appeal Court must, as an appeal court, apply the general rule that an appellate court will not lightly interfere with the factual findings of a court of first instance.[118]

[72] Was the Competition Appeal Court entitled to interfere with the Tribunal's decision on the facts, as it did? This must be assessed with reference to the three main grounds on which the Commission alleged breach of the merger conditions, namely (a) the reduction of staff costs through retrenching and rehiring at lower wages, (b) the alleged breach or circumvention of the merger condition pertaining to the harmonisation of employment conditions and (c) the alleged misuse of the retrenchments to reduce

[114] *Tribunal decision* above n 42 at paras 48 to 79.

[115] *Mediclinic Southern Africa (Pty) Ltd v Competition Commission* [2020] ZACAC 3; [2020] 1 CPLR 66 (CAC).

[116] Id at para 44.

[117] *Imerys South Africa (Pty) Ltd v The Competition Commission* [2017] ZACAC 1.

[118] Id at paras 40-1. See also *Rex v Dhlumayo* 1948 (2) SA 677 (A) at 705-6.

staff through the elimination of posts or roles that were duplicated because of the merger. On each, the Tribunal found in favour of Coca-Cola.

Retrenching and rehiring at lower salaries

[73] On the issue of the alleged retrenching and rehiring of staff at lower salaries in the same posts, the Tribunal considered the rehiring issue to be tied up inextricably with, and indistinguishable from the argument that the retrenchments sought to eliminate posts that were duplicated consequent upon the merger. The duplication issue is dealt with below.

[74] Staying with this topic, if employees were retrenched and then rehired (or replaced by new employees) in the same roles but at lower salaries, the end result would be that no duplicate posts were eliminated, only a change in their terms and conditions. This may be unfair under the LRA,[119] but that would have no bearing on whether or not the retrenchments were in breach of condition 9.2. Indeed, it tends to confirm that Coca-Cola did *not* seek to retrench employees so as to eliminate duplication resulting from the merger, but rather to reduce its labour costs.

Alleged breach of harmonisation condition

[75] The Commission alleges that "it is plausible that the underlying reasons for retrenching employees and rehiring in the same roles at lower costs is an attempt by Coca-Cola to avoid the higher employment costs that are associated with . . . [c]lause 11 of the 2016 merger conditions [which] requires [Coca-Cola] to harmonise working terms and conditions". The observation that must immediately be made is that, once again, this is self-defeating for the Commission's case. If posts or roles have been refilled at lower pay levels, they have not been eliminated through merger-specific retrenchments of those in duplicate roles, but rather to save costs by paying lower wages in straitened circumstances.

[119] I express no view on that.

[76] A fundamental difficulty facing the Commission on this point is that there was no complaint of breach of the harmonisation condition made against Coca-Cola in the Notice of Apparent Breach. To then find non-compliance with that condition would be in breach of Coca-Cola's fundamental right to procedural fairness. The Commission's argument before this Court, that Coca-Cola was obliged in terms of the wording of rule 39(2)(b) to prove substantial compliance with *all* conditions, regardless of what is alluded to in the Notice of Apparent Breach, is not sustainable and would similarly give rise to procedural unfairness. Supporting the view that there was no intention to bring a complaint regarding the harmonisation condition, the Commission's answering affidavit says "[r]egarding harmonisation, the Team correctly noted that 'it was not able to assess whether a breach of the Conditions has transpired'".

Elimination of duplicated posts or roles

[77] The Commission's primary case for a breach of condition 9.2 was based on Coca-Cola's having used the retrenchments to eliminate duplication of posts that arose from the merger.

[78] This complaint must be assessed on a conspectus of the evidence. This includes the very substantial evidence put up by Coca-Cola regarding the three primary reasons it advanced for the retrenchments, namely the poor macro-economic climate, the sugar tax, and the sharp increase in raw material prices.

[79] There was an attempt by the Commission to suggest that the sugar tax was already a known problem at the time of the mergers. However, the Tribunal demonstrated that this was not so, pointing out that the first merger was notified in March 2015 and approved in May 2016, whereas the sugar tax was first raised as a single, unquantified line item in the Minister of Finance's budget speech in February 2016 and formed the subject matter of a National Treasury Policy Paper in July 2016. It then had to make its way through Parliament. Both Coca-Cola and FAWU made a series of oral submissions to Parliament's Standing Committee on Finance regarding the proposed sugar tax, pointing out its potential for causing job losses

amongst other things.[120] It was only once the legislative process had been completed by publication of the Rates and Monetary Amounts and Amendment of Revenue Laws Act[121] on 14 December 2017 that the impact of the tax could be quantified. By then, both mergers were complete.

[80] As the Tribunal noted, the evidence regarding the challenges faced by Coca-Cola was uncontested. The Commission's stance was rather that a substantially reduced profit was still a profit, leaving the Commission's case for disguised merger-specific retrenchments intact. However, on the basis of the evidence of the challenges faced, Coca-Cola established at least a prima facie case that the operational requirements, not the merger, caused the retrenchments. Notwithstanding the concession in this Court by Coca-Cola that it bore the onus, the effect of Coca-Cola having made out a prima facie case was to impose an evidentiary burden of rebuttal on the Commission. The Tribunal was correct in recognising that the Commission faced this evidentiary burden.

[81] The Competition Appeal Court criticised the imposition of an evidentiary burden on the Commission as being erroneous because Coca-Cola had all the information at its disposal and it is not provided for in rule 39.[122] But the rules regarding onus and evidentiary burdens are part of the law of evidence.[123] They need not be expressly sourced in legislation, save perhaps for a reverse onus. The Tribunal did not impose any reverse onus. The Commission has exceptionally wide investigative powers under the Act[124] and these provide more than adequate tools for the Commission to gather the evidence to satisfy a burden of rebuttal.

[120] In one submission, FAWU predicted as many as 8000 job losses.

[121] 14 of 2017.

[122] *CAC judgment* above n 57 at para 69.

[123] See Zeffertt and Paizes, "Chapter 3: The Onus of Proof" and "Chapter 5: Cogency and Proof, Aspects of the Onus of Proof, the Evidentiary Burden, the Meaning of Prima Facie and other Topics relating to Proof*"* in their *The South African Law of Evidence* 3 ed (Lexis Nexis Butterworths, Durban 2017).

[124] Chapter 5 parts A and B.

[82] Part of the evidence that the Commission relied on to demonstrate that the retrenchments were as a result of the merger was information contained in its merger report prepared at the time that the first merger was under consideration. It is dated 11 December 2015. It describes the immediate effect of the then-proposed merger on employment. It points out that "the merging parties submit that the proposed merger will result in the duplication of about 387 functions and hence there will be retrenchments post-merger. In total [the bottling companies] have about 7 549 employees." A table then sets out how those 7 549 employees are divided up between the different bottling companies, listed in the top row of the table, with employee numbers provided, row by row, for the various parts of each enterprise, that is, human resources, finance, marketing, sales, manufacturing, logistics, management and administration. The right-hand column of the table gives the total employees for each part and the total in the bottom right-hand corner of the table reconciles with the total of 7 549 employees.

[83] In the paragraph following the table, it is pointed out that 2 688 of the 7 549 employees are non-bargaining unit employees and the remaining 4 861 employees fall within the bargaining unit. It then states—

> "[t]he merging parties have indicated that the implementation of the proposed transaction will result in the duplication of about 387 positions (non-bargaining unit employees) at an executive, managerial, administrative and technical level. The parties have however reduced the number of job losses from 387 to 250."

[84] What underlay these retrenchments, already envisaged at the time of the merger, is that the combining of the various bottling companies' head offices would lead to duplication at that level. Hence the provision in condition 9.2 that "any retrenchments of employees outside of the bargaining units shall be limited to 250 employees within the category of Hay Grade 12 and above." Retrenchments were not then envisaged in the job categories below this level, because each bottling company operation continued as it had done before the merger, employing the same staff in the same roles. Given

that there was no geographical overlap of these operations, there was at that time no prospect that the merger would lead to a duplication of positions.

[85] The Commission's conclusion that the present retrenchments from within the bargaining unit were as a result of the merger was based substantially on a memorandum dated 30 August 2019 "to inform the Competition Commission Meeting . . . of a complaint alleging a breach of the Merger conditions . . . by the Merged Entity". Central to its reasoning was the following:

> "11.3 The team notes that the retrenchments are taking place in the bottling operations of the Merged Entity. . . . These are the same roles where duplications occurred as a result of the merger and this is what the Conditions aimed to avoid. Below is a table from the Commission's merger report in relation to the Merger indicating the roles where duplications would occur as a result of the merger."

[86] The identical table from the 2015 merger report is then set out. The memorandum then continues as follows:

> "11.4 From the above table, the Team notes that the merger resulted in duplications of roles, but the roles which had a high number of duplications were roles such as manufacturing, logistics and sales and those are the same roles where retrenchments have largely taken place. This indicates that the retrenchments are merger specific as the employees that have been mostly affected by the retrenchments are in the same roles where most of the duplications occurred as a result of the merger."

[87] The drafters of the memorandum were seriously mistaken. The table extracted from its earlier merger report was not one showing where duplications would occur. It was a table giving a breakdown of the *entire workforce* at each of the bottling plants. Hence its total of 7 549 employees. The table did not give any indication of where the duplications would take place. The high numbers in manufacturing, logistics and sales are simply high total numbers of employees in those roles at the time of the merger, as one would expect in bottling and distribution operations. The retrenchments envisaged at the time of the merger were not from these categories. Condition 9.2 itself makes

that clear. It envisaged any retrenchments being limited to employees within the categories of Hay Grade 12 and above, namely managerial and administrative staff and the like.

[88] In truth, the merger report is evidence against the Commission's case. It points to the retrenchments foreseen as a result of the merger as being located at head-office level. This is logical. Head office functions can be, and were in fact, rationalised and consolidated into a single head office. A centralised head office was placed in control over all the operations in the different parts of the country. Not so in the case of employees engaged in operations. No duplication was envisaged in their ranks as a result of the merger because their operations would continue as before in each of their different regions with the same staff.

[89] What *would* give rise to duplication in operations in different regions would be a decline in production; or a restructuring to achieve greater efficiency to save costs. Functions that might have required, say, three persons doing the same job at a higher level of production, might now require only one at a lower level of production or following a restructuring. The evidence bears this out. Those subject to retrenchments included warehouse operators, janitors, cleaners, wash-bay attendants, truck helpers, fleet artisans, panel beaters and so on in the regional bottling businesses. These are not the type of functions that, on the multi-regional logic of this merger, became duplicated because of it.

[90] In a similar vein, the Commission, with support in the judgment of the Competition Appeal Court,[125] seized upon a paragraph from Coca-Cola's attorneys' written submission to the Commission of 20 December 2019. The attorneys said—

> "CCBSA recognises that certain job losses were occasioned by the removal of duplication so as to reduce staff costs, and to change the nature of employment within the firm so as to reduce overall costs in view of unforeseen events post-merger."

[125] *CAC judgment* above n 57 at paras 77 and 85.

[91] This is not a concession that the retrenchments targeted duplication as a result of the merger. It is an assertion that the need to eliminate duplication followed the unforeseen events that followed the merger, which led to the need to reduce overall costs. It lacks any concession of the causal connection with the merger for which the Commission contends.

[92] In these circumstances, there was no basis for the Competition Appeal Court to interfere in the factual findings of the Tribunal. The Tribunal's analysis of the facts was cogent and revealed no misdirection, nor any clear error.

Conclusion

[93] The Competition Appeal Court mischaracterised the nature of the appeal and applied the wrong tests in respect of both review and causation. There was no basis in law or fact for overturning the judgment of the Tribunal. The appeal therefore succeeds.

[94] Coca-Cola sought costs against the Commission in the Competition Appeal Court and in this Court. This would only be appropriate if the Commission had acted unreasonably, frivolously or vexatiously.[126] Coca-Cola has not made out any such case.

[95] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Competition Appeal Court is set aside and replaced with the following order
   "(a) The appeal is dismissed.
   (b) Each party must bear its own costs."
4. Each party must bear its own costs in this Court.

[126] *Competition Commission of South Africa v Pioneer Hi-Bred International Inc* [2013] ZACC 50; 2014 (2) SA 480 (CC); 2014 (3) BCLR 251 (CC) at para 28.

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